No. 83-859

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1983

CALIFORNIA,

Petitioner,

-vs-

CHARLES R. CARNEY,

Respondent.

On Writ of Certiorari to the
Supreme Court of California

RESPONDENT'S BRIEF ON THE MERITS

THOMAS F. HOMANN
Counsel of Record
1168 Union Street, Suite 201
San Diego, California 92101
619-239-9459

GEORGE HAVERSTICK
Attorney

A. DALE MANICOM
Attorney

Attorneys for Respondent

TABLE OF CONTENTS

Jurisdiction 1

The writ of certiorari should be dismissed since a decision in this case will be merely advisory of federal rights and will not change the judgment.. 1

Statement of the Case 16

Summary of Argument 19

Argument 21

Warrantless entry into the living quarters of a parked and immobilized motor home was unjustified under the automobile exception 21

(a) Privacy expectations in living quarters 29

(b) Mobility as a diminished factor 32

(c) Feasibility of obtaining a warrant 33

(d) Real rather than theoretical need 35

Petitioner underestimates the ability of police officers to recognize a motor home 37

Conclusion 41

TABLE OF AUTHORITIES

Cases:	Pages:
Arkansas v. Sanders 442 U.S. 753 (1979)	23
Bellanca v. New York State Liquor Authority, 54 N.Y.2d 229, 429 N.E.2d 765 (1980)	13
Bellanca v. New York State Liquor Authority, 50 N.Y.2d 524, 407 N.E.2d 460 (1980)	13
Cady v. Dombrowski 413 U.S. 433 (1973)	22
Cardwell v. Lewis 417 U.S. 583 (1974)	23
Carroll v. United States 267 U.S. 132 (1925)	9
Herb v. Pitcairn 324 U.S. 117 (1945)	1,2
Mapp v. Ohio 367 U.S. 643 (1961)	4
Michigan v. Long 463 U.S. ___ (1983)	2,4,5,7,8,12,15
New York State Liquor Authority v. Bellanca, 452 U.S. 714 (1981).	13
Oliver v. United States ___ U.S. ___, 52 U.S.L.W. 4425 (April 4, 1984)	30
Payton v. New York 445 U.S. 573	24

People v. Brisendine
13 Cal.3d 528, 119 Cal.Rptr.
315, 531 P.2d 1099 (1975) 6,11

People v. Cahan
44 Cal.2d 434, 282 P.2d
905 (1955) 4

People v. Longwill
14 Cal.3d 943, 123 Cal.Rptr.
297, 538 P.2d 753 (1975) 10

People v. Norman
14 Cal.3d 929, 123 Cal.Rptr.
109, 539 P.2d 237 (1975) 6

People v. Ramey
16 Cal.3d 263, 127 Cal.Rptr.
629, 545 P.2d 1333 (1976) 8,10

Reynolds v. Superior Court
12 Cal.3d 834, 117 Cal.Rptr.
437, 528 P.2d 45 (1974) 11

Silverman v. United States
365 U.S. 505 (1961) 25

South Dakota v. Neville
459 U.S. 553 (1983) 13

South Dakota v. Opperman
428 U.S. 364 (1976) 13,23

State v. Chrisman
94 Wash.2d 711, 619 P.2d
971 (1980) 13

State v. Chrisman
100 Wash.2d 814, 676 P.2d
419 (1982) 13

State v. Neville
312 N.W.2d 723 (S.D., 1981) .. 13

State v. Neville
346 N.W.2d 425 (1984) 13

State v. Opperman
89 S.D. 25, 228 N.W.2d
152 (1975) 13

State v. Opperman
247 N.W.2d 673 (S.D., 1976) .. 13

Stoner v. California
376 U.S. 483 (1964) 24

Tally v. Ganahl
151 Cal. 418, 90 P.2d 1049
(1907) 14

United States v. Chadwick
433 U.S. 1 (1977) 22,31

United States v. Karo
___ U.S. ___, 52 U.S.L.W.
5102 (July 3, 1984) 24

United States v. Ross
456 U.S. 798 (1982) 9,31,32

United States v. Wiga
662 U.S. 1325 (9th Cir., 1981) 12,36

United States v. Williams
630 F.2d 1322 (9th Cir., 1980) 12,36

Washington v. Chrisman
451 U.S. 1 (1982) 13,27

Wimberly v. Superior Court
16 Cal.3d 557, 128 Cal.Rptr.
641, 547 P.2d 417 (1976) 8,9

Constitutions and Statutes:

U.S. Const., Art. III, sec. 2 2
U.S. Const., Amend. IV 3,25
28 U.S.C. sec. 1257(3) 2
Calif. Const., Art. I, sec. 13 3,5
Calif. Const., Art. I, sec. 24 7
Calif. Vehicle Code, sec. 362 38
Calif. Vehicle Code, sec. 23221 ... 38
Calif. Vehicle Code, sec. 23223 ... 38
Calif. Vehicle Code, sec. 23225 ... 38
Calif. Vehicle Code, sec. 23226 ... 38
Calif. Vehicle Code, sec. 23229 ... 38

No. 83-859

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1983

CALIFORNIA,

Petitioner,

-vs-

CHARLES R. CARNEY,

Respondent.

RESPONDENT'S BRIEF ON THE MERITS

JURISDICTION

THE WRIT OF CERTIORARI SHOULD BE DISMISSED SINCE A DECISION IN THIS CASE WILL BE MERELY ADVISORY OF FEDERAL RIGHTS AND WILL NOT CHANGE THE JUDGMENT.

The policy of avoiding advisory opinions on federal constitutional issues is deeply rooted in this Court's decisions. Herb v. Pitcairn, 324 U.S. 117, 126 (1945),

warns:

> "[O]ur power is to correct wrong judgments, not to revise opinions. We are not permitted to render an advisory opinion and if the same judgment would be rendered by the state court after we corrected its views of federal law, our review could amount to nothing more than an advisory opinion."

Therefore, the Court has consistently held that it will not review a state court judgment that is based on an adequate and independent state ground. Herb v. Pitcairn, 324 U.S. at 128; Michigan v. Long, 463 U.S. __, __ (1983).

Furthermore, this Court's jurisdiction is limited by Article III, section 2 of the Constitution and 28 U.S.C. section 1257(3) to review of federal questions; this precludes the Court from

correcting the California Supreme Court's exposition of state constitutional law.

The state court decision in this case is explicitly based on Article I, section 13 of the California Constitution, a provision prominently and independently cited by the California Supreme Court before mention of the Fourth Amendment. (Pet.App. A-6) 1/ Significantly, the California Supreme Court majority indicates the Fourth Amendment protections are only "similar" to the protections provided by Article I, section 13 of the state constitution. (Pet.App. A-6)

1/ The initial citation of legal authority by the California Supreme Court in its opinion is as follows: "Article I, section 13 of the California Constitution establishes the right of the people of this state to be secure in their persons, houses, papers and effects against unreasonable searches and seizures." It is then noted the federal constitution "provides a similar guarantee." (Pet.App. A-6)

The distinct state exclusionary rule of People v. Cahan, 44 Cal.2d 434, 282 P.2d 905 (1955), established before Mapp v. Ohio, 367 U.S. 643 (1961), provides an adequate and independent state law basis for the decision to suppress evidence in this case.

Michigan v. Long, 463 U.S. at ___ adopts an "assumption" that no adequate and independent state grounds exist for a state court decision when "it is not clear from the opinion itself that the state court relied upon an adequate and independent state ground and when it fairly appears that the state court rested its decision primarily on federal law."

It therefore appears the Michigan v. Long "assumption" in favor of jurisdiction arises only (1) when the adequacy and independence of a state ground for

the decision is "unclear" from the opinion, and (2) when the state court decision relies "primarily" on federal law or is "interwoven" with federal law. 2/

The California Supreme Court opinion in this case satisfies neither of the requirements in Michigan v. Long to support an assumption of jurisdiction.

First, Article I, section 13 of the California Constitution is obviously an "adequate" basis for the decision alternative to the federal constitution. The California Supreme Court has pointedly recognized that "California citizens are entitled to greater protection under

---

2/ The state court decision in Michigan v. Long mentioned the state constitution twice, but relied exclusively on federal law, not citing a single state case to support its holding of unreasonable search. Michigan v. Long could be fairly interpreted to indicate when state law is cited as an "afterthought," its adequacy and independence as a basis for the decision is not established.

the California Constitution against unreasonable searches and seizures than that required by the United States Constitution..." People v. Brisendine, 13 Cal.3d 528, 551, 119 Cal.Rptr. 315, 531 P.2d 1099 (1975).

It is equally obvious the California Constitution is "independent" of federal law. The California Constitution itself requires state courts to consider its provisions independently. Therefore, the California Supreme Court in People v. Norman, 14 Cal.3d 929, 939 fn. 10, 123 Cal.Rptr. 109, 539 P.2d 237, (1975) indicated:

> "The people of this sovereign state have directed that we give a meaning to constitutionally guaranteed rights which is independent of limits fixed by the United States Supreme Court as applicable to

parallel rights guaranteed by the United States Constitution. Article I, section 24 of the California Constitution thus declares that 'Rights guaranteed by this Constitution are not dependent upon those guaranteed by the United States Constitution.'"

The independent nature of the state constitution is clearly explicit in the document itself. Surely Michigan v. Long does not require the California state courts to endlessly reiterate explicit provisions of the California Constitution in order to make plain the independent vitality of the state charter. Citation of the California Constitution necessarily invokes the express provisions of Article I, section 24 affirming that Californians' state rights are "not dependent on those guaranteed by the United

States Constitution."

The second requirement for use of the Michigan v. Long assumption, that "the state court rested its decision primarily on federal law," is likewise not satisfied here.

The central issue before the California Supreme Court was which of the established rules of search and seizure law should be applied to the peculiar facts, rules relating to search of vehicles or rules relating to search of homes. The pivotal doctrines at issue were set forth with reference to state court cases which had been decided on state constitutional grounds. Wimberly v. Superior Court, 16 Cal.3d 557, 563, 128 Cal.Rptr. 641, 547 P.2d 417 (1976); People v. Ramey, 16 Cal.3d 263, 271, 127 Cal.Rptr. 629, 545 P.2d 1333 (1976).

In setting forth the scope of

permissible vehicle searches, the California Supreme Court relies first on its own decision in Wimberly v. Superior Court, 16 Cal.3d at 563. The court indicates "[o]ur formulation" of the automobile exception requires a showing that "(1) exigent circumstances rendered the obtaining of a warrant an impossible or impractical alternative, and (2) probable cause existed for the search." (Pet. App. A-10) The California Supreme Court formulation of the automobile exception is plainly more exacting than the federal standard set out in United States v. Ross, 456 U.S. 798 (1982). And while the opinion notes the genesis of an "automobile exception" to the warrant requirement in Carroll v. United States, 267 U.S. 132 (1925), it expressly states "California courts have independently relied on similar reasoning" to fashion

the automobile exception in state courts. (Pet.App. A-11) In addition, for the principle that "Homes are afforded the maximum protection from warrantless searches and seizures," the California Supreme Court relies on its own decision in People v. Ramey, 16 Cal.3d 263, 271, 127 Cal.Rptr. 629, 545 P.2d 1333 (1976). (Pet.App. A-19)

The opinion does consider and discuss decisions of this Court, but in California courts "decisions of the United States Supreme Court defining fundamental civil rights are persuasive authority to be followed by California courts only when they provide no less individual protection than is guaranteed by California law." People v. Longwill, 14 Cal.3d 943, 953 fn. 4, 123 Cal.Rptr. 297, 538 P.2d 753 (1975). Therefore, the California Supreme Court considers itself

"informed but untrammeled by the United States Supreme Court's reading of parallel federal provisions" when construing the state constitution. Reynolds v. Superior Court, 12 Cal.3d 834, 842, 117 Cal.Rptr. 437, 528 P.2d 45 (1974). In People v. Brisendine, 13 Cal.3d 528, 548, 119 Cal. Rptr. 315, 531 P.2d 1099 (1975) the California Supreme Court advises:

> "This court has always assumed the independent vitality of our state Constitution. In the search and seizure area our decisions have often comported with federal law, yet there has never been any question that this similarity was a matter of choice and not compulsion."

The decision of the California Supreme Court here does not directly conflict with any previous decisions of this Court. It is therefore hardly

surprising the opinion does not distinguish between a state rule and a federal rule since the California court considered the federal constitution to be no less protective of rights than the state constitution. The only federal cases on point agree with the decision in this case. United States v. Williams, 630 F.2d 1322 (9th Cir., 1980), cert. denied, 449 U.S. 865; United States v. Wiga, 662 F.2d 1325 (9th Cir., 1981) cert. denied, 456 U.S. 918 (1982).

Emphatically, the decision in Michigan v. Long, 463 U.S. at ___ "does not in any way authorize the rendering of advisory opinions." If the same judgment would be rendered by the California court after this Court corrected its views of federal law, a decision will be merely advisory. Michigan v. Long should be interpreted to preclude decision in cases,

such as this case, when it can be anticipated on remand the state court will merely repeat its previous decision deleting reference to the federal constitution. 3/

Here, even if this Court were to determine the federal question was erroneously decided, the California Supreme

---

3/ The spectre of state courts ignoring this Court's advice on federal law and deciding a case on remand based on a state constitution has already been realized. State v. Opperman, 89 S.D. 25, 228 N.W.2d 152 (1975), reversed, South Dakota v. Opperman, 428 U.S. 364 (1976), on remand, State v. Opperman, 247 N.W.2d 673 (1976); State v. Chrisman, 94 Wash. 2d 711, 619 P.2d 971, (1980), reversed, Washington v. Chrisman, 451 U.S. 1 (1982), on remand, State v. Chrisman, 100 Wash.2d 814, 676 P.2d 419; State v. Neville, 312 N.W.2d 723 (1981), reversed, South Dakota v. Neville, 459 U.S. 553 (1983), on remand, State v. Neville, 346 N.W.2d 425 (1984); Bellanca v. New York State Liquor Authority, 50 N.Y.2d 524, 407 N.E.2d 460 (1980), reversed, New York Liquor Authority v. Bellanca, 452 U.S. 714 (1981), on remand, Bellanca v. New York Liquor Authority, 54 N.Y.2d 228, 429 N.E.2d 765 (1981).

Court's decision under the state constitution will not be altered and the judgment suppressing the evidence will not be affected. Under the California doctrine of the "law of the case," once a principle or rule of law necessary to the decision has been decided in an opinion on appeal, that principle or rule becomes the law of the case and must be adhered to throughout its subsequent progress. Furthermore, the rule must be adhered to "although in its subsequent consideration, [the] court may be clearly of the opinion that the former decision is erroneous in that particular...Indeed, it is only when the former rule is deemed erroneous that the doctrine of the law of the case becomes at all important." Tally v. Ganahl, 151 Cal. 418, 421, 90 P.2d 1049 (1907).

Even if the California Supreme Court

misconstrued the federal authorities discussed in the opinion, and even if this Court were to correct its views of federal law, it can be anticipated the California Supreme Court will reach the same result on remand as it has previously.

The Court's understandable reluctance "in most instances...to examine state law in order to decide the nature of the state court decision" (Michigan v. Long, 463 U.S. at ___) must yield to the greater jurisdictional concern that the Court not render an advisory opinion.

STATEMENT OF THE CASE

During the afternoon of May 31, 1979 (a Thursday), Drug Enforcement Administration Agent Robert Williams was conducting a surveillance investigation in San Diego, following a subject. Agent Williams noticed Respondent Charles R. Carney and kept an eye on him because "he did not look like he fit in the area there, and he was approaching a Mexican boy [sic] and talking to him;" (JA 9,10) Williams estimated the "boy's" age to be "under 18 -- 15, 16, maybe 17." (RT 15) Mr. Carney and the young man proceeded to a nearby parking lot and entered a parked Dodge Motor Home. (JA 12) Williams observed the curtains in the motor home being closed after the two entered. (JA 13)

Noting the license plate number

of the motor home, Williams recalled uncorroborated information he had received anonymously of marijuana being exchanged for sex with males by an unidentified man associated with the motor home. (JA 12)

"Back-up" units were called and agents continued to watch the parked motor home for approximately an hour and fifteen minutes while Mr. Carney and the young man were inside. (JA 13) After the young man had exited the motor home, the agents stopped him and in response to their questioning, he claimed the occupant of the motor home had given him marijuana in exchange for oral sex. (JA 13,14,15)

Williams took the young man back to the motor home and had him knock on the door of the living quarters. Mr. Carney opened the door and stepped outside. (JA 15)

Agent Clem then physically entered the motor home looking for other occupants (JA 20,21,22) and observed marijuana on a table inside. Nothing in the record suggests Clem's entry was based on a claim of probable cause to search for contraband. Mr. Carney was arrested and the motor home was driven to the police station where additional marijuana was discovered during a search of the cupboards and refrigerator. No warrant was ever obtained.

SUMMARY OF ARGUMENT

This case involves the warrantless entry and search of the living quarters of a motor home. The vehicle had not been stopped on a highway, but was parked in an off-street parking lot. A warrant could easily have been obtained.

Petitioner urges the Court to ignore any reasonable expectation of privacy in the living quarters of the parked vehicle, suggesting inherent, but entirely theoretical, mobility alone should justify the warrantless police intrusion. In essence, Petitioner argues for an "inherent mobility" exception to the warrant requirement, a concept repeatedly rejected by this Court.

In evaluating the legitimacy of the search, the Court should consider all the factors which have played a role in the adoption and application of an

"automobile exception." It should consider Mr. Carney's reasonable expectation of privacy in the living quarters of the motor home; it should consider whether the vehicle was actually in transit and whether a risk the motor home would be moved was real or merely speculative; and it should consider whether law enforcement would have been significantly burdened by obtaining a warrant.

Respondent suggests that before a warrantless entry of the living quarters of a motor home may be made, a genuine as opposed to an entirely hypothetical necessity for dispensing with the warrant requirement must exist. This standard will permit application of the automobile exception to the living quarters of a motor home when the reason for such an exception exists and at the same time it accomodates a person's

reasonable expectation of privacy in residential areas.

ARGUMENT

WARRANTLESS ENTRY INTO THE LIVING QUARTERS OF A PARKED AND IMMOBILIZED MOTOR HOME WAS UNJUSTIFIED UNDER THE AUTOMOBILE EXCEPTION.

This case pits one of the core protections of the Fourth Amendment, protection of one's dwelling space from invasions by government agents, against the public need for effective law enforcement. This brief suggests that both interests may be accomodated within the framework of the case at hand.

The California Supreme Court opinion proceeds from the obvious premise "there is a constitutional difference between houses and cars" (Pet.App. A-10), a

distinction said to have originated in the "inherent mobility of automobiles." (Pet.App. A-11) However, the opinion also notes numerous cases upholding warrantless searches of automobiles where mobility played no role at all since the vehicles were either disabled or already in the exclusive control of the police, cases "in which the possibilities of the vehicle's being removed or evidence in it destroyed were remote, if not nonexistent." Cady v. Dombrowski, 413 U.S. 433, 441-442 (1973). In explaining this seeming contradiction between the reason for an automobile exception and the actual application of the exception, the opinion quotes United States v. Chadwick, 433 U.S. 1, 12 (1977) that "the answer lies in the diminished expectation of privacy which surrounds the automobile."

This Court has recognized "the configuration, use, and regulation of automobiles often may dilute the reasonable expectation of privacy that exists with respect to differently situated property," Arkansas v. Sanders, 442 U.S. 753, 761 (1979); privacy interests are diminished because an automobile's "function is transportation and it seldom serves as one's residence or as the repository of personal effects" and "[i]t travels public thoroughfares where both its occupants and its contents are in plain view." Cardwell v. Lewis, 417 U.S. 583, 590 (1974) (plurality opinion). The "obviously public nature of automobile travel" has therefore been recognized to justify more liberal rules for warrantless searches of vehicles. South Dakota v. Opperman, 428 U.S. 364, 368 (1976).

Juxtaposed against this general

Fourth Amendment doctrine, the privacy interests of Mr. Carney in the sanctity of the living quarters in his motor home were considered by the California Supreme Court. Residential areas, temporary or permanent, are afforded the highest degree of protection from warrantless entry, Stoner v. California, 376 U.S. 483, 490 (1964); "'physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed.'" Payton v. New York, 445 U.S. 573, 585 (1980). As recently as United States v. Karo, __ U.S. __, 52 U.S.L.W. 5102, 5104 (July 3, 1984), this Court has indicated:

> "At the risk of belaboring the obvious, private residences are places in which the individual normally expects privacy free from governmental intrusion not authorized

> by a warrant, and that expectation is plainly one that society is prepared to recognize as justifiable. Our cases have not deviated from this basic Fourth Amendment principle. Searches and seizures inside a home without a warrant are presumptively unreasonable absent exigent circumstances."

The California Supreme Court recognized that "[t]o the extent an individual uses a motor home as his permanent or temporary residence, it, as much as a house, serves as his 'place of refuge' in which he should be 'free from unreasonable governmental intrusion.'" (Pet. App. A-23, A-24, quoting Silverman v. United States, 365 U.S. 505, 511 (1961).) The court therefore declined to apply the automobile exception to the facts of this case.

In briefs filed here, California and the other states appearing as amici would have the Court apply the "automobile exception" automatically and invariably to justify all warrantless searches of every potentially mobile vehicle, without regard to where the vehicle is located; without regard to how it is being used; without regard to any legitimate privacy interest in the vehicle; and without regard to any necessity for dispensing with the ordinary warrant requirement. California and the amici states urge the Court to abandon any analysis of reasonable privacy expectations in addressing Fourth Amendment issues involving a potentially mobile vehicle, and, by extension, any

potentially moveable object or effect. 4/

Automatic application of the automobile exception to the facts of this case without any consideration of Mr. Carney's reasonable expectation of privacy in the living area of his immobilized motor home stretches the reason and necessity for an automobile exception too far.

4/ Several issues which may seem to lurk on the fringes of this case are not raised by the facts or by Petitioner. First, the motor home was physically entered by the officers and no plain view observations are claimed to have been made from outside the living compartment. (JA-21 & JA-22) This case is entirely unlike Washington v. Chrisman, 451 U.S. 1 (1982), since the entry and initial search preceded Mr. Carney's arrest. This was not a search incident to arrest. Furthermore, the state does not challenge the California Supreme Court's conclusion the officer was not justified in entering the living compartment to look for other occupants since the prosecution failed to prove any specific articulable facts known by the officers to support a suspicion other persons may have been inside.

Three significant factors warrant rejection of the automobile exception under the facts of this case:

First, the area searched, the living quarters, is an area traditionally associated with the greatest expectation of privacy.

Second, the vehicle was not in transit or stopped on a roadway when the reasons for the search arose and when the search occurred; instead, it was parked off the public street and was being used as a residence.

Third, no genuine need for an immediate search was presented since a warrant could have easily and practicably been obtained.

Privacy expectations in living quarters.

In suggesting the Court abandon any consideration of privacy expectations in this case, Petitioner does not contest the reasonable expectation of privacy reposed in the areas searched here, the living quarters, the drawers, cupboards and the refrigerator of the motor home. The motor home at issue was equipped with curtains, a bed, chairs, a table, kitchen features, and other accouterments of a residence. Whatever diminished expectation of privacy may surround an ordinary automobile or even the driving area of a motor home, the obvious function of the living area was residential, a place designed and used as a sanctuary to escape the intrusions of society. The privacy interest in such an area is manifest.

The Court recently observed that "the touchstone" of Fourth Amendment analysis is whether a person has a "constitutionally protected reasonable expectation of privacy." Oliver v. United States, ___ U.S. ___, 52 U.S.L.W. 4425 (April 4, 1984). Petitioner's argument to disregard any reasonable expectation of privacy in living quarters of a motor home should be rejected. The Solicitor General cogently suggests that "[g]iven the importance of the expectation of privacy factor to the rationale underlying the automobile exception...the doctrine should not uncritically be applied to motor homes simply because they are moveable vehicles." (Brief of the United States as Amicus Curiae, page 12.)

Urging that the Court abandon any consideration of reasonable expectation of

privacy in applying the automobile exception to the facts of this case, Petitioner suggests "inherent mobility" alone will always justify a warrantless probable cause search. This extreme position ignores the fact potential mobility alone has never justified warrantless searches. United States v. Ross, 456 U.S. 798, 809-810 (1982) points out the Court in United States v. Chadwick, 433 U.S. 1 (1977) "squarely rejected" an argument any moveable container that is believed to carry contraband may be searched without a warrant. If potential mobility alone were sufficient reason to dispense with the warrant requirement, Chadwick would have been decided differently.

Chadwick holds there is no "inherent mobility" exception to the warrant requirement.

Mobility as a diminished factor.

The vehicle entered and searched here had not been stopped by police while in transit, a factor which has usually played a significant role in application of the automobile exception. The motor home had been parked in an off-street parking lot for an unknown but extended period of time before any cause or suspicion to search arose. Every indication in the record points to a conclusion the motor home was not being used for transportation but as a residence.

United States v. Ross, 456 U.S. at 806 indicates the automobile exception grew out of a recognition of "the impracticability of securing a warrant in cases involving the transportation of contraband goods." Ross further indicates: "Given the nature of an automobile in transit, the Court recognized that an immediate

intrusion is necessary if police officers are to secure the illicit substance." However, when a vehicle is not in transit, an immediate intrusion is unnecessary since feasibility of obtaining a warrant is significantly increased.

Mobility, as a factor to render the securing of a warrant impracticable, was purely theoretical in this case since the motor home was immobilized; accordingly, mobility is nonexistent as a justification for excusing the ordinary requirement for a warrant here.

Feasibility of obtaining a warrant.

Here there was a total lack of any exigency or necessity for an immediate, warrantless entry and search. There is no indication in the record of even a remote threat the vehicle would be moved from its off-street parking location. After Mr. Carney exited the living

quarters, the vehicle was unoccupied. Petitioner suggests no concrete need for an immediate warrantless entry and search except police convenience. In short, there is no indication of any genuine need for the officers to make an entry without first securing a warrant.

The feasibility and ease of obtaining a warrant under the circumstances in this case are striking. The search occurred on a weekday afternoon while the motor home was parked within a few hundred yards of the courthouse where scores of magistrates were available, ready to issue a warrant. No legitimate claim can be made that obtaining a warrant would have been burdensome or impractical.

The need for an immediate, warrantless search was entirely hypothetical since police could easily have sought a magistrate's permission without

compromising the investigation.

Real rather than theoretical need.

The Solicitor General's suggestion that the automobile exception be applied to a motor home only when it is being used primarily for transportation, is well reasoned. This analysis recognizes the significance of the privacy interests in motor home living quarters, while at the same time accomodating the practical needs of law enforcement to engage in warrantless searches of private places when genuine, as opposed to theoretical, necessity requires such action.

Under this analysis, when a motor home is stopped while in transit, the same considerations making the securing of a warrant for an automobile impractical would usually be sufficient to establish genuine necessity for immediate search of a motor home. Likewise, when

there is reason to believe evidence is being destroyed, or where other specific and articulable exigency necessitates immediate entry of a parked motor home, warrantless entry of the living quarters would be justified under existing law. Such a warrantless entry of motor homes based on an emergency doctrine was approved in both United States v. Williams, 630 F.2d 1322 (9th Cir., 1980) and United States v. Wiga, 662 F.2d 1325 (9th Cir., 1981).

Requiring real, as opposed to purely theoretical necessity when applying the automobile exception to the living quarters of a parked motor home strikes an appropriate balance between the privacy interests of persons using motor homes for residential purposes and the need for effective law enforcement techniques. More importantly, it comports with the

reasons for an automobile exception to the warrant requirement under the Fourth Amendment.

PETITIONER UNDERESTIMATES THE ABILITY OF POLICE OFFICERS TO RECOGNIZE A MOTOR HOME.

Petitioner and the amici states argue police officers are unable to distinguish between an automobile and a motor home and therefore police will be unable to apply any rule which seeks to accomodate the reasonable expectation of privacy a person may have in a motor home. Ultimately, Petitioner argues a motor home distinction is "too technical," apparently based on a belief police are only able to remember and apply the simplest of rules.

This argument underestimates the training and abilities of professional

police officers and fails to recognize they are routinely required to draw similar distinctions and enforce much more technical criminal laws constantly.

For example, California police officers are currently required to distinguish between motor homes and ordinary vehicles. California Vehicle Code section 362 provides "A 'house car' is a motor vehicle originally designed, or permanently altered, and equipped for human habitation..." The definition is significant since California Vehicle Code sections 23225 and 23226 prohibit keeping or storing an open alcoholic beverage container in a vehicle, except "the living quarters of a housecar." California Vehicle Code sections 23221 and 23223 prohibit consumption or possession of opened alcoholic beverages in a vehicle, but section 23229 specifically exempts

"the living quarters of a housecar." California police commonly enforce these particular laws and in doing so are called on frequently to distinguish between an ordinary vehicle and the living quarters of a motor home.

While Petitioner's desire for "bright-line" rules is understandable, neither the concept of probable cause nor the bulk of criminal law itself is readily amenable to "bright-line" distinctions. The substantive criminal law is clotted with "hair-splitting" distinctions, and yet we rely on professional police officers to make instantaneous evaluations and act on these decisions every day when enforcing the criminal law.

The California Supreme Court standard for determining whether a vehicle is a motor home is not so excessively

vague as to seriously impede effective law enforcement. The California Supreme Court merely requires an evaluation of the "outward appearance of a motor home" to determine whether it objectively appears "likely to be serving as at least a temporary residence." (Pet.App. A-29) Notably, the Solicitor General also would distinguish between a vehicle "that is primarily functioning as a vehicle and one that is primarily functioning as a residence." (Brief of the United States as Amicus Curiae, page 18.) The requirement of objective, outward appearance of primary function is sufficient guidance for experienced law enforcement personnel.

There is no debate the vehicle involved in this case was a motor home. Distinguishing between a motor home and other vehicles will be elementary and nearly instinctive in all but the rarest

of circumstances. To argue the term "motor home" is excessively vague is to engage in a largely academic exercise. The concept of what constitutes a motor home is sufficiently clear to withstand the kind of vagueness arguments advanced by Petitioner.

CONCLUSION

The California Supreme Court has already determined the entry and search violated the state constitution and that decision will not be altered by an advisory opinion from this Court on federal Fourth Amendment law. The writ of certiorari should be dismissed as improvidently granted since the decision of the California Supreme Court to suppress evidence was based on an adequate and independent state ground.

If the merits are reached, the Court

should decide a person's reasonable expectation of privacy in the living quarters of a motor home parked off the public street sufficiently outweighs any legitimate law enforcement need to engage in a warrantless entry and search when a warrant could have been obtained easily and practicably. Under the circumstances of this case, the judgment of the Supreme Court of California should be affirmed.

Respectfully submitted,

Thomas F. Homann
Counsel of Record

George Haverstick
Attorney

A. Dale Manicom
Attorney

Attorneys for Respondent
Charles R. Carney

July, 1984